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In the

Supreme Court of the United States

OCTOBER TERM, 1976

PEOPLE OF THE STATE OF ILLINOIS, EX-REL. BERNARD KORZEN, COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS,

Respondent,

vs.

FULTON MARKET COLD STORAGE COMPANY, an Illinois corporation,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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No.

PEOPLE OF THE STATE OF ILLINOIS, EX-REL. BERNARD KORZEN, COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS,

Respondent,

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Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and order of the Supreme Court of Illinois entered January 26, 1976.

OPINIONS BELOW

The opinion of the Circuit Court of Cook County, Illinois, has not been officially reported. The opinions

of the Appellate and Supreme Courts of Illinois are officially reported, respectively, at 22 Ill. App. 3d 1088 (1st Dist. 1974) and 62 Ill. 2d 435 (1976). Copies of these opinions are set out in the Appendix hereto.

JURISDICTION

The Illinois Supreme Court rendered its judgment and opinion on January 26, 1976, and denied a timely filed petition for rehearing on March 25, 1976. A copy of that order is set out in the appendix. This petition is filed within 90 days from March 25, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(I) Whether the Illinois Supreme Court abridged Petitioner's rights of due process and equal protection by enforcing against it an admittedly discriminatory tax.

(II) Whether that Court's application of the doctrine of exhaustion of administrative remedies denied Petitioner's rights of due process and equal protection.

(III) Whether exhaustion of administrative remedies is a condition precedent to assertion of federal constitutional rights in State proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "Section 1. No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IX, § 1 of the Illinois Constitution of 1870 provides in relevant part:

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

Article IX, §4(b) of the Illinois Constitution of 1970 provides in relevant part:

> "Subject to such limitations as to the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. . ."

Chap. 120, Ill. Rev. Stat. (1969) §501 provides, in relevant part:

> "Real property shall be valued as follows: (1) Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale."

All other statutory provisions involved are set forth in the appendix.

STATEMENT OF THE CASE

Real estate taxes in Illinois are levied and become a lien on property as of January 1st of each year. 120 Ill. Rev. Stat. § 508a[1] (1969). The tax is collected in two instalments in the following year. § 675. Each of the 102 counties has its own assessment and collection officials and the procedures for assessment and collection of

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[1] All § references hereafter are to Chapter 120 Ill. Rev. Stat. (1969).

the taxes are found in the Illinois Revenue Act of 1939, as amended.[2]

Real property in Cook county is assessed by an elected assessor. §487. In 1969, for purposes of assessment real property was to be valued "at its fair cash value, estimated at the price it would bring at a fair, voluntary sale". §501. In order to correct errors in assessment the Board of Appeals of Cook County was authorized "on complaint that any property is over assessed or under assessed . . . (to) review and order such assessment corrected." §594. In order that disparities in the levels of assessment of property between counties might be eliminated and property throughout the state assessed uniformly at 100% of fair cash value, the State Department of Revenue was required each year to determine a multiplier for each county to be applied uniformly to the assessments in such county. §§627, 630. Taxes were then extended on the equalized valuation of each parcel in the county at rates certified by the County Clerk. §§642, 643.

The full fair cash value of all property as ascertained in accordance with the Revenue Act is the assessed valuation for all purposes of taxation prescribed in the Constitution. §643. The Constitution of 1870 (in force until supplanted by the Constitution of 1970 on July 1, 1971) required uniformity of assessments. Art. IX §1. See also Circuit Court's order (App. 6a).

In 1969, an Illinois taxpayer who suffered from a discriminatory assessment could obtain judicial relief only by paying his taxes in full under protest, §675, and there-

[2] The Illinois Revenue Act of 1939, as amended, Secs. 1 through 330 are found as §§ 482-811 of Chapter 120, Ill. Rev. Stat. (1969).

after filing objections (which serve as the taxpayer's initial pleading in this statutory procedure) to the County Collector's Annual Application to the Circuit Court of the County for judgment fixing the correct amount of taxes paid under protest. §716. Section 716 requires the Court to enter judgment for the Collector for the correct taxes "as shall appear to it to be due" and to enter judgment on behalf of the objector-taxpayer for any refund to which he is entitled. Until the Court enters judgment the taxes paid under protest are held by the Collector "in suspense". §675.

Petitioner paid its 1968 and 1969 real estate taxes in the amounts of $98,290.00 and $108,128.00 respectively under protest and filed its objections to the 1968 and 1969 Applications of the County Collector in the Circuit Court of Cook County. The County Collector moved to dismiss the 1969 objections on the ground that petitioner had not exhausted its administrative remedies by complaining to the Board of Appeals for 1969. The motion was taken with the case and the objections for both years consolidated for trial (App. 2a).

Upon trial the Court found that petitioner's property had been assessed and equalized for both years at 100% of fair cash value (R148,[3] App. 2a-3a), and that the assessment "was a very accurate, a very good assessment" (R150). The Court, however, also found that property generally in Cook County was assessed and equalized at 42% of fair cash value (R151, App. 3a), and, accordingly, that a disparity of 240% existed between the level of assessment of petitioner's property and that of

[3] The designations R ..... are to the report of proceedings incorporated into the record on appeal. The trial judge read his original findings and conclusions into the record.

property generally (R151, App. 5a). The trier also found a continuity of purpose for not less than six years on the part of the assessor to keep certain classes of property assessed at one level and others at a lower level contrary to the State Constitution and Revenue Act (requiring uniform assessment of all property at 100% of fair cash value), and that the disparities were widespread (App. 4a-6a). The trial court concluded that the foregoing constituted a constructive fraud, and an intentional, wilful and systematic discrimination against Petitioner (App. 5a-6a) on the part of the assessing officials in violation of State Constitutional and statutory requirements. Ill. Const. (1870) Art. IX § 1; § 501 (App. 6a).

The 1968 objections resulted in judgment for Petitioner for a refund of $56,510.00 and for the Collector for $40,000.00. In the 1969 objections the Court held that Petitioner would have been entitled to a refund of approximately $62,000.00[4] of the $108,000 in taxes it had paid under protest for that year but that it had not filed a complaint before the Board of Appeals that year and thus had not exhausted its administrative remedies. Accordingly the Court entered judgment for the Collector in the sum of $108,128, the full amount paid by Petitioner on the authority of *Nordlund* v. *Lans,* 31 Ill. 2d 477 (1964) and *County Collector* v. *Bostwick,* 33 Ill. 2d 74 (1965). The judgment for the Collector included the illegally exacted moiety of $62,000.00.

[4] The refund was the difference between the $108,000 in taxes extended against Petitioner's property and what they would have been had all property in Cook County been assessed and equalized at 100% of fair cash value. See *Peo. ex rel Kohorst* v. *G.M. & O. R.R. Co.,* 22 Ill. 2d 104 (1961).

Petitioner alleged in its Objections for 1969 that it did not file a complaint before the Board of Appeals in 1969 for the reason that its property was then assessed at 70% of fair cash value, or at less than the 100% required by statute (§501); that the customary multiplier of 1.45 of the Department of Revenue would raise its equalized valuation to the 100% required by law; that the Board of Appeals had authority only to correct an assessment and had no authority to reduce its assessment; and that any reduction would have been illegal.

Petitioner further alleged that it had filed a complaint before the Board of Appeals in 1968 and had been told by the Board it deserved no relief and the Board could give it none.

Petitioner expressly asserted its federal constitutional rights in its 1969 Objections by alleging that:

"12. • • • • Such action or failure to act on the part of these public officials and bodies constituted a wilful and intentional fraud upon Objector by requiring it to pay approximately 2.4 times the taxes it would have been required to pay had all property in Cook County been assessed pursuant to the provisions of Section 20 and other applicable provisions of the Revenue Act. The improper execution of the statutes by the Assessor, the Board of Appeals and the Department of Revenue defrauded Objector as a matter of law and deprived it of its property, to wit: approximately $60,000.00, without due process of law contrary to the provisions of Article II and the 14th Amendment of the State and Federal Constitutions, respectively; denied Objector equal protection of the laws contrary to the provisions of said 14th Amendment; and further deprived Objector of the uniformity protection afforded it by Sec. 1 of Article 9 of the State Constitution.

• • •

15. Such failure of the Board of Appeals of Cook County and of the Department of Revenue lawfully to assess or to cause the lawful assessment of property generally in Cook County further evidences a wilful and intentional violation on their part of the Revenue Act, the uniformity provision of the Constitution of Illinois and the due process and equal protection clauses of the State and Federal Constitutions, statutes and constitutions which the said public officials and the Department head officials swore to uphold."

The trial Court failed to address these federal issues. Instead, notwithstanding its own finding that $62,000.00 of Petitioner's total tax of $108,000.00 was illegal and unconstitutional under State statutes and the Constitution of 1870, the trier entered judgment in the full amount for the Collector.

The Illinois Appellate Court reversed on the grounds that Petitioner was not required to exhaust its administrative remedy before the Board of Appeals since that Board had no authority to reduce Petitioner's assessment below the statutory level of 100% of fair cash value. *Peo. ex rel Korzen* v. *Fulton Market Cold Storage Company,* 22 Ill. App. 3d 1088, 1091 (1st Dist. 1974). Having decided the appeal on these grounds, the Appellate Court was not required to and did not reach the federal constitutional questions raised below nor Petitioner's claim on appeal that entry of judgment by the trier for the Collector in an amount which included the illegal moiety of the 1969 taxes constituted forbidden state action in violation of Petitioner's rights under the Fourteenth Amendment. Petitioner, however, briefed and argued these points in the Appellate Court (See Points II, III and IV of Petitioner's brief to the Appellate Court).

The Illinois Supreme Court reversed the Appellate Court and affirmed the trial Court's judgment for the Collector. 62 Ill. 2d 443 (1976). Without reaching the federal constitutional issues, the Illinois Court held that in *Peo. ex rel Kutner* v. *Cullerton,* 58 Ill. 2d 266 (1974) it had ruled that Article IX, § 4(b) of the 1970 Constitution (effective July 1, 1971) ratified the *de facto* classification scheme of assessment which existed in Cook County prior to 1970, and accordingly the Board of Appeals had authority to consider whether Petitioner's property was correctly classified and whether its 1969 assessment was at the same percentage of fair cash value as other property in its classification. Hence, the Court concluded, the Board of Appeals might have reduced Petitioner's assessment to less than the 100% level mandated by § 501 and to a level different from that of other classes of property, contrary to the State Constitutional requirement of uniformity. Ill. Const. (1870) Art. IX § 1. Judgment was therefore properly entered by the trial Court for the full amount of the tax paid (including the illegal moiety) on the grounds that Petitioner had thus failed to exhaust the administrative remedy.

Although Petitioner again raised and briefed its federal constitutional claims (See Points VI and VII of Petitioner's brief to the Illinois Supreme Court), the Illinois Supreme Court failed to reach them.

In its petition for rehearing, Petitioner contended that the decision of the Illinois Supreme Court worked a further and separate deprivation of procedural and substantive due process by denying its right to be assessed and taxed under the laws and constitution as they existed in 1969 (See Point II of Petitioner's petition for rehearing). The petition was denied without opinion or comment on March 25, 1976.

Reasons for Granting the Writ

By rendering judgment for the collector exacting a tax in its major portion illegal and unconstitutional, the Illinois Supreme Court has refused to follow this Court's decision in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), has authorized the use of the State's judicial power to deprive its citizens of federal constitutional rights; and, if its decision is permitted to stand, has established a precedent for use of a state's judicial power to enforce an unjust system of taxation upon its citizenry.

In addition, by applying *People ex rel. Kutner* v. *Cullerton,* 58 Ill. 2d 266 (1974) to this case, the Illinois Court has, contrary to decisions of this Court, abridged Petitioner's rights to equal protection and substantive due process by denying Petitioner the right to be assessed and taxed in 1969 under the laws and State constitution in effect at that time.

I.

THE DECISION BELOW DENIES DUE PROCESS AND EQUAL PROTECTION BY ENFORCING AN ADMITTEDLY DISCRIMINATORY TAX.

The following findings of the trial Court form the basis upon which Petitioner's constitutional claims must be considered: (App. 1a-6a)

(1) Petitioner's property was assessed and equalized in 1969 at 100% while property generally in Cook County was assessed and equalized at 40% of fair cash value.

(2) The evidence showed a continuity of purpose on the part of the assessing officials to assess property

of different classes at different percentages of fair cash value, in violation of Art. IX §1 of the State Constitution, and to assess property generally at a level far below 100% of fair cash value in violation of §501 of Chap. 120, Ill. Rev. Stats.

(3) There is an intentional, willful and systematic discrimination against Petitioner on the part of the assessing officials in permitting the level of assessment in Cook County to be and remain substantially below the 100% level required by the Revenue Act while Petitioner's property is at 100%; and in permitting the assessment of several classes of property and individual properties within the classes at different levels in disregard of the (State) constitutional and statutory requirements.

(4) Objector filed a complaint before the Cook County Board of Appeals in 1968. No change in assessment was made. It did not file a complaint in 1969. Its assessed valuation in 1969 was at 65% and after equalization at 100% of its fair cash value.

(5) But for the fact it failed to exhaust its administrative remedy, Petitioner would be entitled to a refund of the illegal moiety of $62,000.00 of the $108,000.00 in taxes it paid under protest.

On their face the Findings, Conclusions and Order of the trial Court present two of the three basic federal issues at stake in this petition. The first is the violation of Petitioner's federal rights by an intentional, willful and systematic discrimination against Petitioner on the part of the assessing officials whereby its property, though assessed and equalized *de jure* at 100% of fair cash value,

was nonetheless assessed at 2.4 times the level of assessment of property generally. (App. 5a-6a)

Inequities in real estate tax assessments, the Illinois Court holds, deny Fourteenth Amendment rights of due process and equal protection. *The People* v. *Union Station Co.,* 383 Ill. 153, 163 (1943). And this Court has held that the state in the exercise of its taxing power is subject to the requirements of the equal protection and due process clauses of the Fourteenth Amendment, and may not through its taxing officials intentionally, invidiously or systematically single out a tax payer for discriminatory treatment. *Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20 (1907); *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350 (1918); *Iowa-DesMoines National Bank* v. *Bennett,* 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923).

Although the trial court made no particular findings with respect to Petitioner's federal rights, timely asserted in its objections, violations of federal equal protection and due process are patent in the findings as made. Indeed, the language used by the trier in these findings tracks that of this court in *Snowden* v. *Hughes,* 321 U.S. 1, where it said:

> "Another familiar example [of a denial of equal protection] is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official

> breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute." 321 U.S. at 9.

The second federal issue apparent on the face of the trial court's order is the use of state judicial power to enter judgment for the Collector for the entire tax after the court's finding that almost 60% of the tax paid by Petitioner was illegally, fraudulently and unconstitutionally (State) exacted.

It is well settled that the proscriptions of the Fourteenth Amendment, applicable only to so-called state action, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), reach activities of state courts. *American Federation of Labor* v. *Swing,* 312 U.S. 321 (1941); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). Thus, judicial enforcement of constitutionally deficient statutes is forbidden, *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969); *Cf. Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972), as is enforcement of impermissible common law rules, *Ex Parte Virginia,* 100 U.S. 339 (1879) and agreements and practices which, if required by statute or ordinance, would offend constitutional requirements. *Shelley* v. *Kraemer,* 334 U.S. 1 (1949); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Cf. Evans* v. *Newton,* 382 U.S. 296 (1966). Such judicial activity is no less forbidden because it affects property rights as opposed to personal rights. *Lynch* v. *Household Finance Corp., supra.*

Under Illinois law the only method of obtaining judicial relief from illegal and fraudulent action on the part of assessment officials is by payment of the tax in full, §675, and by filing objections in the special statutory proceeding established by §716. This latter section requires the court to enter judgment for the taxpayer for the amount of any

refund and for the Collector for the balance of the tax paid under protest. The tax paid under protest is in "limbo" pending judgment of the court in favor of the parties (the taxpayer and the Collector) in accordance with the right of the case as it may be. §716. *Cf. People ex rel. Schlaeger* v. *Ridge Country Club,* 397 Ill. 127 (1947); *People ex rel. Collector* v. *Redco,* 3 Ill. App. 3d 917 (3d Dist. 1972). Judgment cannot be entered until the exact amount due the county is fixed, *Chickering* v. *Faile,* 38 Ill. 342 (1865); such amount may extend only to the legal moiety, *People ex rel. Sanders* v. *Cairo, Vincennes and Chicago Ry. Co.,* 249 Ill. 97 (1911); and, until judgment, the funds paid under protest are held for the protection of the taxpayer. *People ex rel. Voorhees* v. *Chicago, Burlington and Quincy Railroad Co.,* 386 Ill. 200, 202-203 (1944); *People ex rel. Baird and Warner, Inc.* v. *Lindheimer,* 370 Ill. 424, 429-430 (1939).

It follows that until judgment was entered by the trial court against Fulton in an amount which included the illegal moiety, the Assessor's fraud was not perfected, the taking of Fulton's property without due process was not completed and denial of equal protection of the laws was not finalized. In short, "but for the active intervention of the state courts, supported by the full panoply of state power", *Shelley* v. *Kraemer,* 334 U.S. at 19, the Assessor's unconstitutional discrimination against Fulton would not have been possible. Because the order of the Illinois Supreme Court thus makes the court the very instrument by which Fulton's rights are denied, it follows that the order is constitutionally impermissible and must be vacated:

> State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect

> of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." 334 U.S. at 20.

II.

THE EXHAUSTION DOCTRINE WAS UNCONSTITUTIONALLY APPLIED BY THE COURT BELOW.

Notwithstanding the decision in *People ex rel Kutner* v. *Cullerton,* 58 Ill. 2d 266 (1974) and the retroactive application of Article IX, § 4(b) of the 1970 Illinois Constitution ordered in that case, there can be no doubt whatever what the law was in 1969 relevant to Petitioner's rights in this case. In 1969 the State Constitution required that all taxes be uniformly levied, Ill. Const. (1870), Article IX, § 1; *Tuttle* v. *Bell,* 377 Ill. 510, 512-513 (1941), *cert. denied,* 315 U.S. 815 (1942); *Apex Motor Fuel Co.* v. *Barrett,* 20 Ill. 2d 395, 401 (1960); the Illinois statutes required that all real estate be valued at "fair cash value", § 501, and made it a crime punishable by imprisonment of up to one year for a member of the Board of Appeals to set a valuation at less than the 100% of fair cash value required by §§ 501, 803; and the Illinois Supreme Court consistently and without exception required that the 100% provision of § 501 be observed literally. *People ex rel. Cain* v. *Illinois Central Ry Co.,* 33 Ill. 2d 232 (1965): *People ex rel Hillison* v. *Chicago Burlington and Quincy Ry Co.,* 22 Ill. 2d 88 (1961); *Chicago, Burlington and Quincy Ry. Co.* v. *Department of Revenue,* 17 Ill. 2d 376 (1959). Hence the Constitution and law of Illinois in 1969 as definitively interpreted by the highest state court unequivocally required that assessments be made at 100% of fair cash value and, conversely, forbade the establishment of assessments under 100% of fair cash value.

In view of the foregoing, and the universal rule that exhaustion is not required where the administrative agency is powerless to grant the relief required, it is clear that Petitioner was not obligated to ask the Board of Appeals for relief from the Assessor's discrimination. Although manifestly discriminatory, Petitioner's assessed valuation in 1969 (i.e. 70% of fair cash value (App. 2a.)) was nonetheless well below the 100% level mandated by § 501 and application of the customary multiplier would not have raised that assessment to more than 100% of fair cash value. Hence while it was and still is true that Petitioner needed redress from the Assessor's unconstitutional practices in 1969, it was and is also true that the Board of Appeals' authority in 1969 under § 594 to "correct" Petitioner's assessment was limited to the power to set Petitioner's assessment at 100% of fair cash value and thus, under the circumstances, it lacked authority to aid Petitioner. As the Illinois Appellate Court observed:

> "[T]he Board upon complaint had no authority to reduce objector's assessment to anything less than fair cash value . . . Indeed, had objector filed a complaint, the Board, pursuant to . . . [§501] may have been obligated to raise objector's assessment to fair cash value. Such action, together with the application of the equalizing multiplier, would only have aggravated objector's plight since its property was already assessed at a value above that of the other property in the county and would not have resulted in raising the assessments on those properties which are underassessed." 22 Ill. App. 3d at 1091.

Indeed, inasmuch as it was a crime in 1969 to set a real property valuation at less than 100%, §§ 501, 803, Petitioner, had it sought relief from the Board of Appeals in 1969, would have been suborning a crime.

The court below, however, argues that its ruling in *People ex rel Kutner* v. *Cullerton, supra,* has "changed"

the law as it was in 1969 and that Petitioner's conduct in 1969 should be governed by this retroactive change. In effect the Court reasons that both Petitioner and the Board of Appeals in 1969 should have anticipated that a new Constitution would be adopted in Illinois in 1971, that it would contain a provision (i.e. Article IX, § 4(b)) permitting certain tax practices (i.e. classification of property for purposes of taxation) theretofore forbidden by settled law, and that the State Supreme Court would apply that provision retroactively. Thus the Court below held:

> "There is no question that prior to the adoption of the 1970 Constitution there had been *de facto* classification of real property in Cook County for purposes of taxation . . . and that the practice was ratified by the provisions of section 4(b) of article IX of the Constitution. In determining whether objector's property was overassessed the Board of Appeals was not restricted to consideration of the sole question whether the assessed valuation exceeded the fair cash value. It could also have considered whether the real estate was correctly classified and whether the assessment was at the same percentage of fair cash value as was appled to other property within the appropriate classification." 62 Ill. 2d at 447-448

Manifestly the unavoidable effect of this "reasoning" is to deny Petitioner equal protection of the tax laws as they existed in Illinois in 1969 and to take Petitioner's property without fair notice of the substantive and procedural rules to be applied against it contrary to the requirements of due process. In *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1929) this court considered a situation virtually identical to that at bar. There taxpayer asked the State Court to enjoin collection of an allegedly discriminatory tax without first seeking

relief from the County or State board of equalization, the State Supreme court having previously ruled that such relief was not available therefrom. The authority of that earlier ruling had not been doubted until overruled by the State Supreme Court in *Brinkerhoff-Faris* but by then it was too late for the taxpayer to avail itself of the newly found remedy. There, as in the present case, the taxpayer, when confronted with the surprise decision of the state court, urged on petition for rehearing that the retroactive application of the new decision transgressed the commands of the Fourteenth Amendment. This court reversed because the decision below "denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive rights". 281 U.S. at 678. Speaking for the unanimous court, Mr. Justice Brandeis said:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which is now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.
>
> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious. . . . The violation is none the less clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty

> of due process extends to state action through its legislative, executive, or administrative, branch of government.
>
> • • •
>
> We are not now concerned with the rights of the plaintiff on the merits . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to reexamine and overrule [its earlier decision]. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 281 U.S. 679-682

In *Montana National Bank* v. *Yellowstone County,* 276 U.S. 499 (1928) this court was equally firm in refusing to recognize the exhaustion doctrine as a valid defense to constitutional claims when administrative relief was not available at the time resort to the administrative agency was indicated:

> "It is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the Rogers Case would have rendered any such application utterly futile since

the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision. 276 U.S. at 505.

Cf. N.A.A.C.P. v. *Alabama,* 357 US 449, 457-458 (1958). Excepting the decision below, the Illinois Supreme Court, too, has from its earliest years insisted upon procedural fairness in tax matters when new legislation or rulings affect pre-existing rights. *Cf. Marsh* v. *Chesnut,* 14 Ill. 223, 227-228 (1852); *Conway* v. *Cable,* 37 Ill. 82, 89 (1865); *People ex rel. Endicott* v. *Prather,* 343 Ill. 437, 448-449 (1931); *People ex rel. Lord* v. *Wabash Ry. Co.,* 311 Ill. 579, 583-584 (1924). It is therefore clear that the court below, in refusing Petitioner relief for a supposed failure to exhaust an administrative remedy added a procedural deficiency to the substantive deprivation resulting from the Assessor's discriminatory assessment and for this reason must be reversed. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, supra.*

III.

THE EXHAUSTION DOCTRINE DOES NOT BAR ENFORCEMENT OF THE RIGHTS HERE IN ISSUE.

Even if considerations of Federal due process did not preclude use of a State's common law exhaustion doctrine to frustrate enforcement of Petitioner's Fourteenth Amendment rights, this Court's rulings in *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963); and *Metcalf* v. *Swank,* 444 F 2d 1353 (7th Cir. 1971) *vacated and remanded,* 406 U.S. 914 (1972) would. And unless this Court is prepared to hold that State Courts may be less zealous than Federal Courts in protecting Federal constitutional claims, *contra, Chicago Welfare Rights Organization* v. *Weaver,* 56 Ill. 2d 33 (1973),

appeal dismissed, 417 U.S. 962 (1974),[5] the decision below should be summarily set aside on authority of these cases.

CONCLUSION

As was Dean Pound 70 years ago, our profession is today much concerned with popular dissatisfaction with the administration of justice. Consider, then, the dissatisfaction, the disbelief of Petitioner when it learned in 1976 that in 1969 its attorney should have violated his own oath to uphold the Constitution and laws of Illinois and used his skills to persuade the Board of Appeals to violate their similar oaths by subverting the statutes and state constitutional provisions governing assessments; when told that a constitutional convention as yet uncalled would in a later year, with the assistance of the highest court of the state, decree that what was unlawful had been, in fact, lawful and that one who abided by the laws as then written would, because it so abided, be severely penalized and its attorney rebuffed by the same court which licensed him because in honor he would not suborn a violation of the law.

Wherefore, Petitioner respectfully prays that a Writ issue.

Respectfully submitted,

JAMES L. FOX AND
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Chicago, Illinois 60602
Counsel for Petitioners

[5] This case of course is distinguishable in that administrative relief there was easily and frequently had whereas here the relief required by Petitioner was forbidden by law.

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT — COUNTY DIVISION

IN THE MATTER OF THE APPLICATION OF BERNARD KORZEN AS COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND ORDER OF SALE AGAINST LANDS AND LOTS UPON WHICH THE TAXES REMAIN DUE AND UNPAID FOR THE YEAR 1969 AND FOR JUDGMENT FIXING THE CORRECT AMOUNT OF ANY TAX PAID UNDER PROTEST FOR THE YEAR 1969.

PEOPLE OF THE STATE OF ILLINOIS, EX-REL. BERNARD KORZEN, COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS,

RELATOR

vs.

FULTON MARKET COLD STORAGE COMPANY, an Illinois corporation,

OBJECTOR

1969 Objection No. 61

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

After trial of the issues raised by Objections of Fulton Market Cold Storage Company, the court, having considered the evidence and the arguments of counsel and the motion to dismiss filed by the Relator, makes findings of fact and reaches conclusions of law as follows:

FINDINGS OF FACT

(1) Fulton Market Cold Storage Company, the Objector, is an Illinois corporation which on January 1, 1969 owned an improved parcel of real estate known as 1000 West Fulton Market in Chicago, Illinois. The property is in West Township, assessment district No. 3, and the last quadrennial year for this district was 1966.

(2) The subject property has Permanent Index No. 17-08-411-001. In the quadrennial year, the Assessor of Cook County fixed the assessed valuation at $1,080,785, and the same assessed valuation obtained for 1969. In 1969, the Department of Revenue certified an equalization factor of 65.79% for Cook County and a multiplier of 1.52. The equalized valuation for 1969 for the subject property was $1,642,793.

(3) Objector filed its Complaint before the Board of Appeals of Cook County for 1968. No change in assessment was made by the Board. It did not file a Complaint before said Board for 1969. The assessed valuation of Objector's property for 1969, viz., $1,080,785, was substantially below its fair cash value, viz., approximately 65% thereof. The multiplier for 1969 was determined by the Department of Revenue after the Board had adjourned. Application of the 1969 multiplier for Cook County of 1.52 resulted in an equalized valuation of $1,642,793 for Objector's property, approximately equal to its then fair cash value.

(4) Pursuant to Section 716 of Chapter 120, Illinois Revised Statutes, the Objector paid its 1969 real estate tax of $108,128.64 in full and under protest. The protest related to 100% of the valuation and/or equalization factor. Thereafter the corporation filed the within objection to the application of the County Treasurer for judgment and order of sale of 1969 general taxes.

(5) The 1968 Objection proceedings by this taxpayer were tried with the 1969 proceedings. By stipulation of the parties, it has been agreed that the evidence introduced by Objector would apply to both years.

(6) From the testimony of and other evidence presented by Objector's appraiser, the Court finds a tentative fair market value of $1,451,000 for Objector's property on January 1, 1969. Since the equalized assessed valuation is $1,642,793, the Court finds that the difference in value or in opinions of value is insufficient to justify the substitution of this Court's opinion for the judgment of the administrative authority. Accordingly, this Court finds that the fair cash value of the premises for the year 1969 was $1,642,793; and that Objector's property was assessed and equalized at 100% of its full fair cash market value.

(7) The median assessment ratio for all real estate in Cook County for the five years preceding the year in question was 27% for 1964; 26% for 1965; 25% for 1966; 26% for 1967; and 22% for 1968. For 1969 it was 22%. The weighted average assessment ratio for the year 1969 was 27.38%. After equalization, this is 41.62%. The weighted average assessment ratio is the percentage of fair cash value at which property generally in Cook County is assessed.

(8) The median assessment ratios for the County for the six years including 1969 are at or below 27%. These ratios show that real property generally in Cook County is and has been assessed at a level far below the 100% of full fair cash value required by Section 20 of the Revenue Act. The ratio figures further establish a continuity of purpose on the part of the assessment officials of the County to keep the overall assessment level below that prescribed by the Act.

(9) The sales ratio data of the Department of Revenue show wide variations in the assessment levels, both among the 17 classes into which the Department groups the 44 classifications into which the Assessor assigns real property in the County and within those classifications. Such variations over what is not less than a six-year period establish a continuity of purpose on the

part of the assessment officials to assess property of different classes at different percentages of fair cash value. Such variations between the said several classes of real property violate the provisions of Section 20 of the Revenue Act and the uniformity provision of the State Constitution.

(10) For six years, the Assessor of Cook County has had available to him the aforesaid statistical information provided by the Department of Revenue. Despite the availability of such information, he has made no effective change or correction in either the overall level of assessment, the disparate levels at which various classes of property are assessed, or in the inequalities which exist within the several classes. Such failure to use this readily available data to correct the overall assessment level and the class disparities establishes an intention on the part of the Assessor to continue the violations of the State Constitution and the Revenue Act, and work a constructive fraud upon Objector.

(11) The Deartment of Revenue is charged with the responsibility of making the assessment ratio studies and thus has knowledge of the constitutional and statutory violations inherent in the assessment procedures of the local assessment officials. Further, said Department has certified multipliers to Cook County for the six-year period which fall far short of bringing the assessment level up to 100% of fair cash value. The Department has not used its powers under Sections 130, 131 and 140 of the Revenue Act to direct and supervise the assessment for taxation of all real property in this State to the end that all assessments be made relatively just and equal; to order a reassessment of property and to cause such reassessment to be made by local assessment officers and cause the same to be substituted for the original assessment; and, further, to order a reassessment whenever it shall appear to the Department that real property in any county has not been assessed in substantial compliance with law or has been unequally or improperly assessed.

(12) The continuing noncompliance by the Department of Revenue with the requirements of the Revenue Act during the aforesaid period establishes an intention on its part to permit the overall assessment ratio in Cook County to remain substantially below 100% and to continue the disparities existing between and within the various classes of property.

(13) There is an intentional, wilful and systematic discrimination against Objector on the part of the Assessor and the Department of Revenue in: (a) permitting the level of assessment in Cook County, both before and after equalization, to be and remain substantially below the 100% level required by the Revenue Act while Objector's property is assessed and equalized at 100% of fair cash value; and (b) permitting the assessment of several classes of property and individual properties within the classes at different levels in disregard of the constitutional and statutory requirements.

(14) The level at which Objector's property is assessed is approximately 240% of the level at which property generally in Cook County is assessed.

(15) Personal property, generally, in Cook County is assessed and equalized at the same level as real property.

CONCLUSIONS OF LAW

(1) The action of the Assessor of Cook County in assessing property generally in Cook County for the year 1969 at 27.38% of fair cash value and of the Department of Revenue in equalizing property generally in Cook County for that year at 41.62% of fair cash value while assessing and equalizing Objector's property at 100% of fair cash value constitutes a constructive fraud upon Objector.

(2) The action of the Assessor and Department of Revenue in assessing and equalizing property in Cook

County so that the general levels of assessment, i.e., at 27.38% and 41.62% of fair cash value, respectively, and in such manner that substantial disparities exist between the assessment levels of the various classes of property and between individual properties within these classes, constitutes a violation of Sections 20, 130, 131 and 140 of the Revenue Act, Sections 501, 611, 612 and 621 of Chapter 120, Illinois Revised Statutes; and deprives Objector of its rights under the uniformity provisions of Section 1 of Article IX of the State Constitution. (1870)

(3) Had Objector filed its Complaint before the Board of Appeals of Cook County for 1969, it would be entitled to a refund of approximately $62,000 of the $108,128 in taxes it paid for said year, said refund being the difference between its taxes as extended and what they would have been had all property in Cook County been assessed and equalized at 100% of fair cash value. Since it did not do so, this Court is compelled to follow the rules of the Supreme Court in *Nordlund* v. *Lans*, 31 Ill.2d 477, and in *County Collector* v. *Bostwick*, 33 Ill.2d 74, and deny relief.

ORDER

It Is Therefore Ordered that judgment be entered in favor of the Relator and against Objector in the sum of $108,128.64. Since Objector has paid said amount under protest, said judgment is hereby ordered satisfied in full and the Relator shall take nothing further in these proceedings.

ENTER:
/s/ Illegible
Judge

In re APPLICATION OF COUNTY TREASURER OF COOK COUNTY —(THE PEOPLE *ex rel.* BERNARD KORZEN, COUNTY TREASURER, Relator-Appellee, *v.* FULTON MARKET COLD STORAGE COMPANY, Objector-Appellant.)

(No. 59447; Reversed and remanded.)

First District (5th Division)—September 27, 1974.

1. TAXES (§ 216.10)—*Board of Appeals lacks authority to reduce assessment to anything less than fair cash value.*

In view of Revenue Code provision establishing fair cash value as standard of real property valuation for tax purposes, County Board of Appeals, on owner's complaint that owner's property, was assessed at higher level than was other property in county, would lack authority to reduce owner's assessment to anything less than fair cash value notwithstanding provision of Code authorizing Board of Appeals in counties of 500,000 or more inhabitants to order assessment corrected on complaint that property was overassessed or underassessed (Ill. Rev. Stat. 1969, ch. 120, pars. 501(1), 594).

2. TAXES (§ 481)—*tax objection procedure is proper remedy to pursue when assessment is contested.*

When taxpayer properly complains that he is bearing a disproportionate share of tax burden because of undervaluation of other property in county, Illinois Supreme Court has indicated that tax objection procedure is proper remedy to pursue.

3. TAXES (§ 495)—*measure of recovery when undervaluation of other property is alleged.*

When taxpayer properly complains that he is bearing a disproportionate share of tax burden because of undervaluation of other property in county, measure of recovery is difference between amount of taxes extended against objector and amount which would have been extended had locally assessed property been equalized at 100% of full, fair cash value, and proper measure

of damages is not the amout of tax the objector would have paid had its property been valued at same level as other property in county.

4. TAXES (§ 241)—*when property owner need not file complaint with Board of Appeals before seeking relief in circuit court.*

Realty owner which complained that its property was assessed at a higher level than was other property in county was not required to file complaint with County Board of Appeals before seeking relief in circuit court by filing objections to county collector's application for judgment and sale of real property taxes.

Appeal from the Circuit Court of Cook County; the Hon. Robert J. Dempsey, Judge, presiding.

Moses, Gibbons, Abramson & Fox, of Chicago (James L. Fox, of counsel), for appellant.

Bernard Carey, State's Attorney, of Chicago (Sheldon Gardner, Henry A. Hauser, Donald P. Smith and Alan L. Fulkerson, Assistant State's Attorneys, of counsel), for appellee.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Upon application of the Cook County collector, the circuit court of Cook County, basing its decision on objector's failure to exhaust its administrative remedies, entered judgment against objector for 1969 real property taxes. On appeal objector contends: (1) that it was not required to exhaust its administrative remedies; (2) that the judgment resulted in a deprivation of due process of law; (3) that the Federal civil rights act is applicable; and (4) that the civil rights act is not affected by the exhaustion of administrative remedies doctrine.

Objector, after paying its taxes under protest as required by sections 194 and 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1969, ch. 120, pars. 675 and 716), filed lengthy objections to the Cook County collector's

application for judgment and sale of its 1969 real property taxes. The thrust of the objections was that because of the improper assessment procedures utilized in Cook County it was required to bear a disproportionate part of the tax burden.

The Cook County collector filed a motion to dismiss the objections for failure to exhaust administrative remedies pointing out that the objector had not filed a complaint regarding its 1969 assessment with the Cook County Board of Appeals. Objector filed an answer to the motion to dismiss alleging that the statute does not require it to appear before the Board of Appeals; that an appearance before the Board would be a useless act; that the Board had adjourned prior to the determination of the 1969 multiplier; and that the value of the property is not at issue.

After an evidentiary hearing, the trial court made the following determinations substantially in accord with the allegations in the objections: (1) that the objector owns improved property at 1000 West Fulton Market in Chicago; (2) that the fair market value of the property in 1969 was $1,451,000; (3) that for 1969 the property was assessed at $1,080,785, or at about 65% of the fair cash value, and was equalized at $1,642,793, which is within the realm of reasonable differences of opinion regarding fair cash value; (4) that objector did not file a complaint for 1969 with the Cook County Board of Appeals; (5) that median assessment for real property in Cook County for 1969 and the five preceding years are less than or equal to 27% of fair cash value indicating a continuity of purpose on the part of assessment officials to keep the assessment levels below the level of fair cash value prescribed by the Revenue Act; (6) that wide variations exist in the assessment levels of the different classes of property in Cook County and among the properties in each class indicating a continuity of purpose on the part of the assessing officials to assess property at different percentages of fair cash value; (7) that both county

and state officials have taken no steps to correct the situation; and (8) that there is an intentional, wilful and systematic discrimination against the objector as a result of which objector's property is assessed at about 240% of the level for property generally in Cook County. The court concluded that this situation worked a constructive fraud on objector; that the assessing officials were violating sections 20, 130, 131, and 140 of the Revenue Act of 1939 (Ill. Rev. Stat. 1969, ch. 120, pars. 501, 611, 612 and 621); and that those officials were depriving objector of its rights under the uniformity provisions of the Illinois Constitution of 1870. The court noted that objector would have been entitled to a refund of approximately $62,000 had it filed a complaint with the Board of Appeals. However, since objector did not file such a complaint, on the strength of *People ex rel. Nordlund* v. *Lans*, 31 Ill.2d 477, 202 N.E.2d 543, and *People ex rel. County Collector* v. *Bostwick*, 33 Ill.2d 74, 210 N.E.2d 189, the court entered judgment for the county collector.

OPINION

Objector first contends that it was not required to exhaust its administrative remedies. It argues that an apperance before the Board of Appeals was a useless act since the Board lacked authority to change the instant assessment and because it had previously been denied relief before the same Board; that justice requires that an exception to the doctrine of exhaustion of administrative remedies be made here; and that the cases relied upon by the trial court are distinguishable.

Objector's primary argument is that the Board of Appeals lacked authority to change the 1969 assessment on its property. The Revenue Act was specific regarding the standard to be applied in 1969 for valuing real property. Section 20(1) of the Code (Ill. Rev. Stat. 1969, ch. 120, par. 501(1)) provides:

> "Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale."

Objector points out that the equalized assessment of its property for 1969 was essentially equal to the fair cash value of its property and the trial court made a finding to that effect. Thus, it is clear that the ultimate effect of the process of assessment and equalization in the instant case was in conformity with section 20(1) as it then existed.

• 1 Objector argues that since its property was properly valued albeit after equalization, the Board of Appeals had no authority to act on any complaint it might have filed even upon a showing that it was bearing a disproportionate share of the tax burden as a result of other property in the county. However, in view of section of the Revenue Act (Ill. Rev. Stat. 1969, ch. 120, par. 594) specifies the powers and duties of Boards of Appeal in counties of 500,000 or more inhabitants. Paragraph (1) of that section states:

> "On complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected."

The State argues that the terms "over assessed" in this paragraph provide ample authority for the Board to act in the instant case where objector complains that its property was assessed at a higher level than was other property in the county. However, in view of section 20(1) of the Revenue Act, establishing fair cash value as the standard of real property valuation for tax purposes, the Board upon complaint had not authority to reduce objector's assessment to anything less than fair cash value. (See *Chicago, Burlington & Quincy R.R. Co.* v. *Department of Revenue*, 17 Ill.2d 376, 391, 161 N.E.2d 838, 847.) Indeed, had objector filed a complaint, the Board, pursuant to section 20(1), may have been obligated to raise objector's assessment to fair cash value. Such action, together with the application of the equalizing multiplier, would only have aggravated objector's plight since its property was already assessed at a value above that of the other property in the county and would not have resulted in raising the assessments on those properties

which are underassessed. Furthermore, objector cannot be expected to file a complaint with the Board of Appeals for each and every parcel of underassessed property in the county.

• 2-4 When a taxpayer properly complains that he is bearing a disproportionate share of the tax burden because of the undervaluation of other property in the county, the Illinois Supreme Court has indicated that the tax objection procedure is the proper remedy to pursue. (*People ex rel. Cain* v. *Illinois Central R.R. Co.*, 33 Ill.2d 232, 210 N.E. 516; *People ex rel. Kohorst* v. *Gulf, Mobile & Ohio R.R. Co.*, 22 Ill.2d 104, 174 N.E.2d 182; *People ex rel. Hillison* v. *Chicago, Burlington & Quincy R.R. Co.*, 22 Ill.2d 88, 174 N.E.2d 175; *People ex rel. Callahan* v. *Gulf, Mobile & Ohio R.R. Co.*, 8 Ill.2d 66, 132 N.E.2d 544.) The proper measure of damages in such circumstances is *not* the amount of tax the objector would have paid had its property been valued at the same level as other property in the county. Such a measure of damages would require a departure from the statutory standard of valuation. (*People ex rel. Hillison* v. *Chicago, Burlington & Quincy R.R. Co.*, 22 Ill.2d 88, 102, 174 N.E.2d 175, 181-182.) Rather, as the court explains in *People ex rel. Kohorst* v. *Gulf, Mobile & Ohio R.R. Co.*, 22 Ill.2d 104, 112, 174 N.E. 2d 182, 187, "[t]he measure of recovery is the difference between the amount of taxes extended against the objectors and the amount which would have been extended had the locally assessed property been equalized at 100% full, fair cash value." It is clear that the Board of Appeals was in no position to grant this relief, the amount of the tax bill not then being known.

In these circumstances, objector was not required to file a complaint with the Board of Appeals. The judgment of the circuit court of Cook County is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SULLIVAN, *P.J.*, and BARRETT, *J.*, concur.

(No. 47154.—Appellate court reversed; circuit court affirmed.)

THE PEOPLE *ex rel.* BERNARD KORZEN, County Collector, Appellant, v. FULTON MARKET COLD STORAGE COMPANY, Appellee.

Opinion filed Jan. 26, 1976.—Rehearing denied March 25, 1976.

1. TAXES—*exhaustion of the administrative procedures in the Revenue Act of 1939 is a condition precedent to filing objections to the collector's application for judgment.* Exhaustion of the administrative procedures provided in the Revenue Act of 1939 is a condition precedent to filing objections to the collector's application for judgment, and the filing of a complaint with the Board of Appeals is required even though the Board has denied relief on an earlier similar complaint filed within the quadrennium. (Pp. 446-47.)

2. SAME—*filing a complaint with the Board of Appeals may not be necessary if there is no means by which a reduction in the assessed valuation of the objector's property can be effected.* If there is no means by which a reduction in the assessed valuation of an objector's property can be effected under the statutory administrative procedure, the filing of a complaint with the Board of Appeals may not be required. (P. 447.)

3. SAME—*in considering whether an objector's property is overassessed, the Board of Appeals is not restricted to considering whether the assessed valuation exceeds the fair cash value.* In determining whether an objector's property is overassessed, the Board of Appeals is not restricted to consideration of the sole question whether the assessed valuation exceeds the fair cash value; it can also consider whether the real estate is correctly classified and whether the assessment is at the same percentage of fair cash value as was applied to other property within the appropriate classification, and this was true even before the *de facto* classification of real property in Cook County was ratified by the provisions of section 4(b) of article IX of the 1970 Constitution. (Pp. 447-48.)

CREBS, *J.*, took no part.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. Robert J. Dempsey, Judge, presiding.

Bernard Carey, State's Attorney, of Chicago (Sheldon Gardner, Deputy State's Attorney, and Henry A. Hauser and Alan L. Fulkerson, Assistant State's Attorneys, of counsel), for appellant.

Moses, Gibbons, Abramson & Fox, of Chicago (James L. Fox, of counsel), for appellee.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Fulton Market Cold Storage Company (hereafter objector) appealed from the judgment of the circuit court of Cook County entered in favor of Bernard Korzen, county treasurer and *ex officio* county collector of Cook County (hereafter collector), upon the collector's application for judgment for sale of objector's real estate for unpaid general taxes for the year 1969. The appellate court reversed (22 Ill. App. 3d 1088), and we allowed the collector's petition for leave to appeal.

Section 113 of the Revenue Act of 1939 (Ill. Rev. Stat. 1969, ch. 120, par. 594(1)) provided in pertinent part that in counties of 500,000 or more inhabitants, the Board of Appeals in any year shall, "On complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected." Section 20 of the Revenue Act provided that "real property shall be valued at its fair cash value * * *." (Ill. Rev. Stat. 1969, ch. 120, par. 501(f).) Objector had filed a complaint before the Cook County Board of Appeals contesting the assessment of its real estate for 1968 but had filed no such complaint for 1969. It paid the general taxes for each year under protest, and filed objections to the collector's application for sale. The objections were consolidated for trial and it was stipulated that the evidence introduced by objector would apply to the objections for both years.

The circuit court found that the equalized assessed value of objector's real estate was approximately the same as its fair cash value, that the equalized assessed value of all property in Cook County was 41.62% of its fair cash value, that the 1968 assessment of objector's property was, therefore, constructively fraudulent, and ordered a refund to objector in the amount of $56,510.99. The court found that the 1969 assessment was also constructively fraudulent. It stated that objector would have been entitled to a refund of approximately $62,000 of the $108,128 it had paid under protest, but because objector had not filed a complaint before the Board of Appeals, acting under compulsion of *People ex rel. Nordlund* v. *Lans,* 31 Ill.2d 477, and *People ex rel. County Collector* v. *Bostwick,* 33 Ill.2d 74, the court allowed the collector's motion to dismiss the objections and entered judgment for the collector for the full amount of taxes assessed.

The appellate court held that although the assessment for 1969 was constructively fraudulent the Board of Appeals was not empowered either to grant objector relief on the ground that its property was assessed at a higher level than other property in Cook County or to reduce the assessed value of its real estate to less than its fair cash value, that under these circumstances objector was not required to file a complaint before the Board of Appeals precedent to seeking relief in the circuit court, and reversed the judgment.

The collector contends that the appellate court erred in holding that the Board of Appeals was not empowered to correct the overassessment of which objector complained. Citing *People ex rel. Kutner* v. *Cullerton,* 58 Ill.2d 266, and *La Salle National Bank* v. *County of Cook,* 57 Ill.2d 318, the collector argues, that the Cook County assessor was authorized to classify real estate, that the fair cash value of objector's real estate should properly be defined as that percentage of fair cash market value at which other property of the same class was assessed, that under this definition objector's property may have been over-

assessed, and that the Board of Appeals was empowered to grant relief. The collector contends that the objector was required to exhaust its administrative remedies and, having failed to do so, the circuit court judgment must be affirmed.

Although recognizing the established rule that a taxpayer must exhaust his administrative remedies prior to seeking relief in the courts, objector contends that the circumstances here rendered the rule inapplicable. It contends that the Board of Appeals was not empowered to correct the fraudulent disparity in assessment which resulted from the improper underassessment of other property in Cook County. It argues that because its property was properly assessed at approximately its fair cash value the assessment could be reduced only by debasing the assessed valuation and that under *People ex rel. Hillison* v. *Chicago, Burlington & Quincy R.R. Co.*, 22 Ill. 2d 88, and *Chicago, Burlington & Quincy R.R. Co.* v. *Department of Revenue*, 17 Ill.2d 376, such debasement was prohibited. It argues that it could not obtain relief under the administrative procedure, and that it was therefore not required to file a complaint before the Board of Appeals.

This court has held that exhaustion of the administrative procedures provided in the Revenue Act is a condition precedent to filing objections to the collector's application for judgment (*People ex rel. Nordlund* v. *Lans*, 31 Ill.2d 477), and that the filing of the complaint was required even though the reviewing board had denied relief on an earlier complaint filed within the quadrennium (*People ex rel. County Collector* v. *Bostwick*, 33 Ill.2d 74). The reason for the rule is well stated in *Bostwick* wherein the court said:

> "In our opinion one of the purposes in providing for consideration by the board of review of alleged assessment errors in each year was to provide a simple, economical and expeditious method whereby a taxpayer might secure a review thereof. While objector argues that since no change in assessed value can be made without notice in years intervening between quadrennial ones, and, since no change was made and no notice given, he should not be required to perform a useless act and duplicate his 1958 appearance, this argument is predicated upon his assumption that had he presented his complaint to the board in 1959 and 1961 relief would have been denied. While it is possible that this result would have obtained, such is not a necessary conclusion, for even though the basis for complaint was similar in each year, different methods of proof might have been used, personnel of the board might have been altered, or, if the facts and personnel remained identical, the opinion of the board might have changed. Although objector's argument is not without force, we believe it would be a perversion of the manifest statutory intent were we to hold that the statute contemplates appearance before the board of review only in a quadrennial year or an intervening year in which a change in valuation is made." 33 Ill.2d 74, 77.

If it were shown that there was no means by which the reduction in the assessed valuation of objector's property could be effected under the statutory administrative procedure it could perhaps be argued that the filing of the complaint was not required. (*Illinois Bell Telephone Co.* v. *Allphin*, 60 Ill.2d 350, 358.) That, however, was not the case. There is no question that prior to the adoption of the 1970 Constitution there had been *de facto* classification of real property in Cook County for purposes of taxation (*La Salle National Bank* v. *County of Cook*, 57 Ill.2d 318) and that the practice was ratified by the provisions of section 4(b) of article IX of the Constitution (*People ex rel. Kutner* v. *Cullerton*, 58 Ill.2d 266). In determining whether objector's property was overassessed the Board of Appeals was not restricted to consideration of the sole question whether the assessed

valuation exceeded the fair cash value. It could also have considered whether the real estate was correctly classified and whether the assessment was at the same percentage of fair cash value as was applied to other property within the appropriate classification. In our opinion the record fails to show circumstances which invoked an exception to the rule that the statutory administrative procedures must be followed prior to filing objections to the collector's application for judgment for sale of the real estate.

For the reasons stated the judgment of the appellate court is reversed, and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed;

circuit court affirmed.

MR. JUSTICE CREBS took no part in the consideration or decision of this case.

CLERK OF THE SUPREME COURT

March 25, 1976

Moses, Gibbons, Abramson
& Fox
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No. 47154 — Bernard Korzen as County Treasurer, etc., appellant, vs. Fulton Market Cold Storage Company, an Illinois corporation, appellee. Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court

120 Ill. Rev. Stat. § 630 (1969) provides:

> The assessments of the property, as returned by the county clerks, shall be equalized by adding to the aggregate assessed value thereof in every county in which the Department may find the valuation to be less than full, fair cash value, such rate per cent as will raise the same to its full, fair cash value, estimated as provided in Section 148a of this Act, and by deducting from the aggregate assessed value thereof, in every county in which the Department may find the valuation to be more than full, fair cash value, such rate per cent as will reduce the same to its full, fair cash value.
>
> But no rate per cent whatever shall be certified by the Department to raise or reduce the aggregate assessed value thereof, as returned by the County Clerk of any county in which such aggregate assessed value shall be more than ninety-nine and less than one

hundred one per cent of the estimate of the full, fair cash value of such property forwarded by the Department to the county clerk as provided by Section 148a of this Act.

120 Ill. Rev. Stat. § 675 (1969) provides in part:

Current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes, shall receive and receipt for such taxes in installments. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land remains unpaid, the collector shall enter such specification in his return, so that the part on which the tax remains unpaid may be clearly known. The tax may be paid on an undivided share of real estate. In such case the collector shall designate on his record upon whose undivided share the tax has been paid.

If any person desires to object pursuant to Section 235 of this Act to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall first pay all of the tax installments due, and such payment shall be accompanied by a writing, substantially in the following form. . .

• • •

No protest shall prevent or be a cause to delay in the distribution of tax collections among the taxing bodies of any taxes collected which were not paid under protest. The collector may withhold from distribution the amounts paid under protest or 1% of the total taxes collected, whichever is less. The collector shall deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution.

120 Ill. Rev. Stat. § 716 (1969) provides in part:

The court shall examine said list, and if defense (specifying, in writing, the particular cause of objection) be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be.

• • •

If any party objecting to any tax paid under protest is entitled to a refund of the amount, or any part thereof, so paid under protest, the court shall enter judgment accordingly. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein. . .

SUPREME COURT, U. S.
FILED
JUL 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1854

**PEOPLE OF THE STATE OF ILLINOIS, ex rel.
BERNARD J. KORZEN, County Treasurer
and Ex-Officio County Collector of Cook County, Illinois,**

Respondent,

vs.

**FULTON MARKET COLD STORAGE COMPANY,
an Illinois corporation,**

Petitioner.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1857

**PEOPLE OF THE STATE OF ILLINOIS, ex rel.
BERNARD J. KORZEN, County Treasurer
and Ex-Officio County Collector of Cook County, Illinois,**

Respondent,

vs.

**FULTON MARKET COLD STORAGE COMPANY,
an Illinois corporation,**

Petitioner.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Cook County (pages 1a-6a of the Petition) is unreported. The opinion of the Illinois Appellate Court is reported at 22 Ill. App. 3d 1088 (1st Dist. 1974), and the opinion of the Illinois Supreme Court is reported at 62 Ill.2d 443 (1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the Illinois Supreme Court's decision requiring the Petitioner to exhaust its statutory administrative remedy constituted a violation of the Petitioner's rights under the Fourteenth Amendment to the United States Constitution.

Whether, considering previous decisions of the Illinois Supreme Court interpreting the Illinois Revenue Act of 1939, the Illinois Supreme Court erred when it held the Petitioner must exhaust its statutory administrative remedy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the Petition, Respondent calls this Court's attention to Section 113 of the Illinois Revenue Act of 1939, Ill. Rev. Stat. 1969, Ch. 120, § 594, which provided in pertinent part:

> In counties containing 500,000 or more inhabitants, the board of appeals in any year shall:
>
> (1) On Complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected.

STATEMENT OF THE CASE

The Petitioner (hereafter referred to as the taxpayer) is an Illinois corporation owning property subject to the real estate tax law of Illinois. Respondent (hereafter referred to as the Collector) is the local tax official charged with the collection of real estate taxes pursuant to Illinois law.* The subject matter of this case deals with local real estate taxes assessed against the taxpayer's property for the year 1969, which taxes were payable in 1970.

After paying its 1969 real estate taxes in full and under protest pursuant to section 194 of the Revenue Act of 1939, Ill. Rev. Stat. 1969, Ch. 120, § 675, the taxpayer appeared and objected to the Collector's annual application pursuant to section 235 of the Revenue Act, Ill. Rev. Stat. 1969, Ch. 120, § 716. At the close of the evidence, the trial court granted the Collector's motion to dismiss based upon the taxpayer's admitted failure to exhaust its administrative remedy provided in section 113 of the Revenue Act, Ill. Rev. Stat. 1969, Ch. 120, § 594.

The taxpayer maintained that, in view of the uniformity provisions of the 1870 Illinois Constitution, the Board of Appeals lacked authority to grant relief where a taxpayer's property is subject to a constructively fraudulent assessment. Therefore, the taxpayer argued that it was not required to exhaust an administrative remedy which did not authorize relief.

The Illinois Supreme Court, interpreting section 113 of the Revenue Act, ruled that a constructively fraudulent assessment is an "over-assessment" within the meaning of that section; and that, indeed, the Board of Appeals was empowered to grant relief.

---

* Edward J. Rosewell, the present County Treasurer and Ex-Officio County Collector of Cook County, Illinois is the successor in office to the Respondent Bernard J. Korzen.

ARGUMENT

Introduction

We submit that the decision of the Illinois Supreme Court, which the taxpayer petitions this court to review, is a decision based solely upon questions of state law. This Court has long held that it will decline to review a state court's judgment which is based upon independent and adequate state grounds. Illinois provides a taxpayer whose property is assessed at a discriminatory level an opportunity to obtain judicial review of such an assessment once the taxpayer has exhausted his available administrative remedies. Therefore, Illinois real estate taxpayers are afforded the panoply of rights secured to them by the Fourteenth Amendment to the United States Constitution.

I.

THE PETITION RAISES QUESTIONS OF STATE LAW ONLY.

This Court has held on numerous occasions that when a taxpayer's property has been assessed at a disproportionately higher level than other similar property subject to taxation, such discrimination, if proved, constitutes a violation of federally protected rights under the Fourteenth Amendment to the United States Constitution. *Sioux City Bridge v. Dakota County*, 260 U.S. 441 (1923); *Hillsborough v. Cromwell*, 326 U.S. 620 (1946). Illinois courts have consistently held that a taxpayer who proves that his property is assessed at a disproportionately higher level of assessment than other similar property subject to taxation is entitled to relief after exhaustion of his available administrative

remedies. See Argument II, *infra*. Clearly then Illinois law is in compliance with the mandates of the *Sioux City Bridge* and *Hillsborough* decisions.

More important to the instant action is this court's decision in *Mellon v. McCafferty*, 239 U.S. 134 (1915). In that case this court was asked to review a state court's affirmance of the dismissal of an action to enjoin the collection of state taxes. The state court had ruled that the taxpayer's failure to resort to adequate administrative remedies provided by state law barred the action. Upon dismissing the writ of error for want of jurisdiction, this court noted:

> "[T]he duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified." 239 U.S. at 139.

Clearly, the taxpayer's argument parallels that of the taxpayer in *Mellon*. Here the taxpayer *assumed* that if it appeared before the Board of Appeals to contest its 1969 assessment the error complained of (a constrictively fraudulent assessment) could not have been rectified. That, as the Illinois Supreme Court pointed out, was not the case. Accordingly, we submit that the instant taxpayer seeks not to persuade this Court to interprete new law, but rather to review a decision of the Illinois Supreme Court interpreting Illinois law.

The cases which the taxpayer relies upon to support its exhaustion argument are clearly inapposite. In both *Brinkerhoff-Faris Company v. Hill*, 281 U.S. 673 (1930) and *Montana Bank v. Yellowstone County*, 276 U.S. 499 (1928) the respective state supreme courts had, by previous decisions, deprived each of the taxpayers of an administrative procedure to contest the tax in question. While the taxpayer herein attempts to bootstrap itself within the purview of the above cited decisions, the Il-

linois Supreme Court has never held that the Board of Appeals lacks authority to correct a constructively fraudulent assessment of locally assessed property. Accordingly, we submit that the question raised herein was settled by this Court in *Mellon v. McCafferty, supra.* Therefore, we submit that the Petition fails to present a federal question, important or otherwise.

II.

IN LIGHT OF ITS PREVIOUS DECISIONS INTERPRETING THE REVENUE ACT OF 1939, THE ILLINOIS SUPREME COURT'S DECISION WAS CLEARLY CORRECT.

The taxpayer maintains that in 1969 it was forced to bear a disproportionate share of the tax burden in Cook County because its property was properly assessed, while all other property in Cook County was under valued. The courts of Illinois have held that an Illinois taxpayer who proves that his property is assessed at a constructively fraudulent level is entitled to relief. *People ex rel. Skidmore v. Anderson,* 56 Ill.2d 334 (1974). In such instances the assessment which is placed upon the taxpayer's property, though statutorily correct,* is disproportionately higher than the assessments which are placed on similarly situated property. *Clarendon Associates v. Korzen,* 56 Ill.2d 101, 105 (1973); *People ex rel. County Collector v. American Refrigerator Company,* 33 Ill.2d 501, 505 (1965).

Importantly, Illinois courts have held section 113 of the Illinois Revenue Act of 1939, Ill. Rev. Stat. 1969, Ch. 120, § 594, to be a condition precedent to the taxpayer's right to seek judicial review of an assessment which is alleged to be constructively fraudulent. *Mix v. The People,* 116 Ill. 265, 273 (1889); *People ex rel. Nordlund v. Lans,* 31 Ill.2d 477, 480 (1964); *People ex rel. County Collector v. Bostwick,* 33 Ill.2d 74, 76-78 (1965); *People ex rel. Needham v. Abbott Estate,* 47 Ill.2d 491, 497 (1970); and *Lopin v. Cullerton,* 26 Ill.App.3d 748, 750 (1st Dist. 1975). The taxpayer, however, contends that it does not fall within the purview of section 113. In 1969 section 113 provided in relevant part:

> In counties containing 500,000 or more inhabitants, the board of appeals in any year shall:
>
> (1) On Complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected.

The taxpayer maintains that since its property was assessed at 60% of its fair cash value in 1969, the only action the Board of Appeals could have taken would have been to raise the assessment to 100% of fair cash value. In view of the uniformity provisions of the 1870 Illinois Constitution,* the taxpayer argues that the Board was powerless to lower the assessment placed on its property to 40% of fair cash value, notwithstanding that property in Cook County was generally assessed at that level in 1969. Accordingly, the taxpayer concludes that it had no duty to appear before the Board of

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* In 1969 section 20(1) of the Illinois Revenue Act of 1939, Ill. Rev. Stat. 1969, Ch. 120, § 501(1) provided in relevant part:

> "Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale."

* The Illinois Constitution of 1970 now provides:

> "Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. . . ." Ill. Const. art. IX, § 4(b) (1970).

Appeals in 1969 because the Board had no authority to grant the taxpayer relief from the excessive assessment challenged.

We submit that the taxpayer's entire argument is built upon the erroneous premise that an over assessment is an assessment in excess of 100% of the fair cash value of the taxpayer's property. Illinois courts have recognized that a constructively fraudulent assessment is, in fact, an over assessment. In *People ex rel. County Collector v. American Refrigerator Company*, 33 Ill.2d 501, 505 (1965) the Illinois Supreme Court found constructive fraud where the taxpayer's property was assessed at 98% of fair market value, while other locally assessed property was assessed at only 55% of fair cash value. In *Clarendon Associates v. Korzen*, 56 Ill.2d 101 (1973), the Illinois Supreme Court held:

> "[W]hen property is assessed disproportionately higher than other similar property . . . or the assessed value is reached under circumstances showing either a lack of knowledge of known values or a deliberate fixing of values contrary to known value, fraud will be inferred." 56 Ill.2d at 105.

The taxpayer's interpretation of section 113 would render the Board of Appeals powerless to remedy assessments that are clearly fraudulent. Incredibly, the taxpayer would put the Board of Appeals in the position of compounding the alleged fraud of which the taxpayer complains!

We submit that the taxpayer's reliance upon *People ex rel. Cain v. Illinois Central R.R. Co.*, 33 Ill.2d 232 (1965) and *C.B. & Q. R.R. Co. v. Department of Revenue*, 17 Ill.2d 376 (1959) is clearly misplaced. In both cases the taxpayers (railroad companies owning real estate in Illinois) attacked allegedly discriminatory multipliers which were applied to locally assessed real estate.

However, the instant taxpayer challenges its original assessment rather than the affect of a multiplier upon that assessment.

We, therefore, respectfully submit that the Illinois Supreme Court correctly ruled that the taxpayer's failure to appear before the Board of Appeals and seek review of its 1969 assessment foreclosed the taxpayer's right to judicial review of that assessment.

CONCLUSION

For the foregoing reasons, the respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted.

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July 22, 1976